

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

FILED BY *[Signature]* D.C.
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COMMODITY FUTURES TRADING)
COMMISSION,)
Plaintiff,)
v.)
FXTRADE FINANCIAL, LLC, et al.,)
Defendants.)

THOMAS M. GOULD
CLERK, U.S. DISTRICT COURT
W.D. OF TENNESSEE
WITNESS

NO. 04-2181 D/An

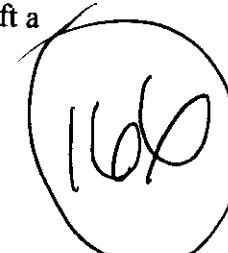
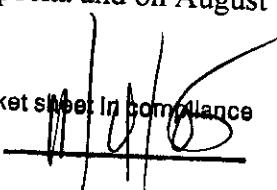
REPORT AND RECOMMENDATION

Before the Court is Plaintiff's Contempt Motion Against Defendants Catherine Mischler and Steven Sibbit, Sr., For Failure to Comply with Subpoena Duces Tecum filed on August 18, 2005. United States District Judge Bernice B. Donald referred this matter to the Magistrate Judge for a report and recommendation. For the reasons set forth below, the Court recommends that Plaintiff's Motion be **GRANTED**.

Background

On July 7, 2005, Plaintiff served a subpoena upon Catherine Mischler seeking a number of documents and requested that she comply with the subpoena by July 21, 2005. On July 11, 2005, Plaintiff served a subpoena upon Steven Sibbit, Sr., also seeking a number of documents and requested that he comply with the subpoena by July 25, 2005. When Plaintiff did not receive a response from either person by July 28, 2005, it sent a letter to each demanding compliance. On August 11, 2005, Plaintiff left telephone messages for Catherine Mischler and Steven Sibbit, Sr., regarding their failure to comply with the subpoena and on August 15, 2005, Plaintiff again left a

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telephone message for Steven Sibbit, Sr., but was unable to do so for Catherine Mischler because no answering machine picked up. Letters were again sent to both persons regarding their failure to comply on August 12, 2005, via regular and electronic mail. To date, Plaintiff has not received any response from Catherine Mischler or Steven Sibbit, Sr., regarding the subpoenas.

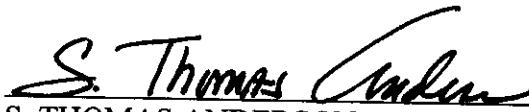
Analysis

Federal Rule of Civil Procedure 45 authorizes parties to issue subpoenas to persons commanding them to "produce and permit inspection and copying of designated books, documents or tangible things in the possession, custody or control of that person." Fed. R. Civ. P. 45(a)(1)(C). In the event that the person served with such a subpoena objects to the inspection or copying of any or all of the designated materials, he or she is required to serve a written objection upon the party that issued the subpoena. Fed. R. Civ. P. 45(c)(2)(B). The Rule further provides that "Failure by any person without adequate excuse to obey a subpoena served upon that person may be deemed in contempt of the court from which the subpoena issued." Fed. R. Civ. P. 45(e). In the present case, Catherine Mischler and Steven Sibbit, Sr., have not served any written objections upon Plaintiff regarding the subpoenas duces tecum at issue. They have simply not responded to Plaintiff's repeated attempts to obtain the documents listed in the subpoenas.

It is well established that the Court can enter an order compelling a party to comply with a subpoena duces tecum. See *Marshall v. Bramer*, 828 F.2d 255 (6th Cir. 1987); *Bariteau v. Krane*, 206 F.R.D. 129 (W.D. Ky. 2001); *Arctic Express v. United States*, 12 F. Supp. 2d 723 (S.D. Ohio 1996). In the matter before the Court, Catherine Mischler and Steven Sibbit, Sr., have neither served a written objection upon the Plaintiff concerning the subpoenas duces tecum nor have they presented to the Court an "adequate excuse" as to why they have failed to answer

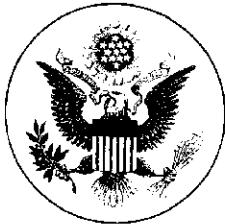
the subpoenas. Therefore, the Court orders that Catherine Mischler and Steven Sibbit, Sr., shall have eleven (11) days from the entry of this Report and Recommmendation to comply with the Subpoena Duces Tecum. Defendants are cautioned that they could be found in contempt if they do not comply. Plaintiff shall submit an affidavit setting forth the amount of expenses and fees incurred due to the preparation and filing of this Motion within fifteen (15) days from entry of this Order.

ANY OBJECTIONS OR EXCEPTIONS TO THIS REPORT MUST BE FILED WITHIN TEN (10) DAYS FROM THE DATE OF SERVICE OF THE REPORT. FAILURE TO FILE THEM WITHIN TEN (10) DAYS OF SERVICE MAY CONSTITUTE A WAIVER OF OBJECTIONS, EXCEPTIONS, AND FURTHER APPEAL.



S. THOMAS ANDERSON
UNITED STATES MAGISTRATE JUDGE

Date: November 03, 2005



Notice of Distribution

This notice confirms a copy of the document docketed as number 166 in case 2:04-CV-02181 was distributed by fax, mail, or direct printing on November 4, 2005 to the parties listed.

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Honorable Bernice Donald
US DISTRICT COURT